

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 20TH FEBRUARY 2007 / 1ST PHALGUNA 1928

CRL.A.No. 573 of 2005()

SC.25/1997 of ADDL. SESSIONS COURT (ADHOC), KALPETTA
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APPELLANTS: ACCUSED NOS.1,2, 13 14 & 15

1. MADAMPALLI MAMMOOTTY, S/O.MOOSA,
AGED 35/93, PEECHAMKODE, PORUNNANNUR AMSOM.
2. KADAR MAJEED, S/O.ABDULLA,
AGED 33/93, NALLURNADU AMSOM,
KUNNAMANGALAM, PEECHAMKODE.
3. O.C.ABDULLA @ OSSAM ABDULLA,
S/O.MOIDEEN, AGED 42/93,
KOYIPPALAMKUNNU, PEECHAMKODE,
NALLURNADU AMSOM.
4. CHEENAMBADAN AZEEZ, S/O.ABDULLA,
PEECHAMKODE, NALLURANADU AMSOM.
5. MAKKI ABDULLA, S/O.MOIDU,
AGED 35/93, PEECHAMKODE, NALLURNADU AMSOM.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT: COMPLAINANT

STATE OF KERALA, THROUGH THE
CIRCLE INSPECTOR OF POLICE, MANANTHAVADY,
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.RAVINDRA BABU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 20/02/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

CRL..M.APPL.No. 3849/2005 in CRL.A.573/2005

Dismissed.

20-2-2007

Sd/-K.Thankappan,
Judge.

K.Thankappan, J.

Crl. A. No. 573 of 2005

Dated this the 20th day of February, 2007

JUDMENT

The accused Nos. 1,2,13,14 and 15 in S.C. 25 of 1997 on the file of the Court of the Additional Sessions Judge (Adhoc)-I, Wayanad, Kalpetta are the appellants. The appellants and 11 other accused faced trial for the offences punishable under sections 143, 147, 148, 452, 323, 120B, 307 read with section 149 IPC. Brief facts of the prosecution case against the appellants and other accused is as follows:- On 19th September, 1993 there was a communal clash at Kundala in Mananthavady between the Bharathya Janata Party and Muslim League. Enraged at this, the appellants and other accused persons, who entered into a criminal conspiracy to murder PW1 and PW2 Gopu, the supporters of Bharathya Janatha Party, armed with deadly weapons like chopper, iron rod etc., formed themselves into an unlawful assembly at 1 A.M. on 20-9-1993 and reached the house of PW1 and when PW1 opened the door, the appellants and other accused persons trespassed into the house of PW1, appellants 1 and 2 inflicted cut injuries with a chopper on PW1, the 9th accused beat PW1 with an iron rod and the other accused persons beat and kicked PW1 and thereby caused grievous injuries to PW1 and thereby attempted to kill PW1. On the above allegation

the appellants and other accused persons have been committed the offence punishable under section 143, 147, 148, 452, 323, 120(b), 307 read with section 149 IPC. To prove the case against the appellants and other accused, PW1 to PW17 were examined and Exts.P1 to P13 were marked. MO1 to MO6 were also marked. When the appellants were questioned under section 313 of Cr.P.C., they denied the allegation and stated that they were innocent. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found that the appellants guilty under sections 143, 147, 148, 452, 323, 307 read with section 149 IPC and they were convicted thereunder and sentenced to undergo rigorous imprisonment for two years each and to pay a fine of Rs.51,000/- each and in default to undergo simple imprisonment for three months each under section 147 read with 149 IPC. Though the appellants were found guilty under section 143 and 147 read with section 149, section 147 being a higher offence involving all these ingredients, no separate sentence was awarded under section 143 IPC as per section 71 IPC. They were sentenced to undergo rigorous imprisonment for two years each and to pay a fine of Rs.20,000/- each and in default to undergo simple imprisonment for four months each under section 148 read with section 149 IPC. They were also sentenced to undergo rigorous

imprisonment for five years each and to pay a fine of Rs.25,000/- each and in default to undergo simple imprisonment for six months under section 452 read with section 149 IPC. The trial court found that the appellants were found guilty under sections 323 and 307 read with section 149 IPC and they were sentenced only for higher offence under section 307 IPC to undergo rigorous imprisonment for 10 years each and to pay a fine of Rs.1,00,000/- each and if the fine amount of Rs.1,00,000/- was realized, that would be given to PW1 towards the pain and suffering. Challenging the conviction and sentence ordered against the appellants, the appeal is filed.

2. The learned counsel for the appellants has taken the following contentions to challenge the impugned judgment. Firstly, the learned counsel contended that the trial court has committed serious error in relying on the evidence tendered by the prosecution witnesses to enter a finding against the appellants, as the evidence tendered by the witnesses are mutually contradictory and inconsistent. Secondly, it is contended that the trial court had committed serious error in finding the appellants guilty under sections 143, 147, 148, 452, 323, 307 read with section 149 IPC, as the witnesses failed to identify the appellants as the persons who

had participated in the commission of the offences. Thirdly, it is contended that the trial court had committed serious error in convicting the appellants under section 307 IPC, as there was no medical evidence to prove that the appellants had committed the above acts in prosecution of their common object to commit murder as alleged by the prosecution. Finally, the learned counsel contended that the sentence awarded against the appellants are excessive.

3. As per the prosecution case, the motive to commit the offence by the appellants and other accused is the common object of committing the murder of PW1 on account of political enmity. The prosecution mainly relies on the evidence of PW1 injured, PW3 Mohanan, PW4 Francis, PW5 wife of PW1 and PW6 daughter of PW1. All these witnesses were examined as occurrence witnesses to the prosecution. PW1, PW3 to PW6 were examined as eye witnesses to the occurrence. PW3, PW4, PW7 and PW8 were not supporting the prosecution case and hence they were declared as hostile to the prosecution. PW9 was examined to prove Ext.P3 mahazar. He identified MO1 and MO2. PW10 and PW11 were also examined to prove Ext.P4 recovery mahazar, under which certain material objects were recovered

4. PW, the injured, stated that on the date of the incident he along with his wife was sleeping at the room on the western side of the middle room and at about 12- 12.30, they heard some one knocking at the door. He came to the central room and switched on the light to kolai. He saw three - four persons who were known to him, the appellants, and in total there were about 10 - 12 persons. He further stated that when he opened the door, 1st appellant inflicted a cut on his left shoulder, in which he sustained injuries, and the 2nd appellant inflicted another cut on his head and on that cut his ear also wounded and ear hanged. Thereafter shouting “കൊല്ലവനെ കൊല്ല” 2nd appellant pushed him to the courtyard. Then two or three persons beaten and kicked him with iron rod and coffee stick. PW1 specifically stated that appellants 1 and 2 inflicted cut on his body. He identified 2nd appellant, 5th appellant, 1st appellant, 3rd appellant and 4th appellant. He also identified the material objects.

5. PW2, son of PW1, stated that his father sustained injury on 19-9-1991. On that day he was not in the house and he was in his wife's residence. He stated that his father had disclosed that the appellants

and others came to the house in the night and his father was called out and when he came out of the house, 1st appellant inflicted a cut, then followed by Majeed inflicted a cut on his head and pushed him to the courtyard shouting “കൊല്ലവനെ കൊല്ലൂ” PW5, wife of PW1, stated that at about 12 O' Clock they heard some one knocking on the door and after switching on light, PW1 went to the varandha. She and her daughter accompanied PW1 stood at the door of the varandha. Then 2nd appellant requested to open the door. She stated that they saw some people outside. Among them she identified appellants 1 and 2. She further stated that “ഭർത്താവ് വാതിൽ തുറന്ന് അപ്പോഴേക്കും അവർപ്രതികൾ വരാത്തയിലേക്ക് തള്ളിക്കയറി വാക്കത്തികൊണ്ട് മമ്മൂട്ടി ആദ്യം കൈപ്പലക്ക് വെട്ടി. രണ്ടാമത് മജീദ് കൊടുവാളു കൊണ്ട് തലക്കിട്ട് വെട്ടി ഭർത്താവിനെ ഉന്തി ഇട്ടു. കൊല്ലവനെ കൊല്ലവനെ എന്നു പറഞ്ഞു തള്ളി.”

6. PW6, daughter of PW1, had given evidence in support of the evidence of PW1 and PW5. She identified appellants 1 and 2. She stated as follows:-

“ഞാനും അമ്മയും മദ്ധ്യ ഭാഗത്തുള്ള മുറിയുടെ വാതുക്കൽ നിന്നു. കുറേപ്പേർ പത്ത് പതിനൊന്ന് പേർ മറ്റുറത്തു

നിൽക്കുന്നതു കണ്ടു. രണ്ടുപേരെ എനിക്കതിൽ അറിയാമായിരുന്നുള്ളൂ. പക്ഷേ പരിചയമുള്ളവരുണ്ടായിരുന്നു. മാടമ്പള്ളി മമ്മൂട്ടി, കാദർമജീദ് എന്നിവരാണ് അതിൽ ഉണ്ടായിരുന്ന എനിക്ക് പേരിറയാവുന്നവർ. അച്ഛനവരോട് എന്തിനാണ് വന്നതെന്നു ചോദിച്ചു. ഒരുകാര്യം പറയാനുണ്ട് എന്ന് കാദർമജീദ് പറഞ്ഞു. അങ്ങനെ പറഞ്ഞപ്പോൾ അച്ഛൻ മുറ്റത്തേക്കുള്ള വാതിൽ തുറന്നു. അപ്പോൾ ആക്കുട്ടത്തിലാരോ കൊല്ലവനെ എന്നു പറഞ്ഞു തള്ളിക്കയറി. എന്നിട്ടച്ഛനെ മാടമ്പള്ളി മമ്മൂട്ടി അച്ഛനെ തോളിൽവെട്ടി. പിന്നെ കാദർമജീദ് അച്ഛന്റെ തലക്ക് ഇടതുഭാഗത്ത് വെട്ടി. തലക്ക് ഒരു ഭാഗം ചെവിയൊക്കെ തൂങ്ങി ചോരവന്നു. പിന്നെ അച്ഛനെ മുറ്റത്തേക്ക് തള്ളിയിട്ട് ആരൊക്കെയോ അടിക്കുകയോ ചവിട്ടുകയോ ഒക്കെയായ്തു.”

The trial court after considering the evidence came to the conclusion that in the light of evidence of all eye witnesses and injured it is clearly came in evidence that the incident of inflicting two cut injuries by sharp edged weapon took place while PW1 was opening the varandha's door opening to courtyard and after inflicted cut injuries PW1 was pushed to the courtyard and beaten indiscriminately using iron rod and coffee stick.

7. Question to be decided in this appeal is whether the prosecution has succeeded in proving the entire case against the appellants?

8. The allegation is that due to communal clash at Kundala

between the Bharathiya Janata Party and Muslim League, during night of 19-9-1993, some persons came to the house of PW1, tapped at the door. The 2nd appellant told PW1 to open the door and while opening the door the accused rushed inside shouting to kill him and 1st appellant inflicted a cut on the shoulder of PW1 and 2nd appellant inflicted cut injury on his head which cut his ear to a hanging stage and he was pushed to the courtyard and there he was beaten with iron rod and stick and he sustained injuries.

9. If so, question to be decided is whether the appellants and others have got any common object in attacking PW1 and whether they entered into any conspiracy to attack PW1?

10. The prime motive as alleged by the prosecution for the offence committed by the accused was due to political clash between the political parties. If that be so, the common object was to attack PW2, the son of PW1 who belongs to B.J.P. The evidence of PW1, PW4 and PW5 would not show that the persons who assembled, including the appellants, have got any common object to attack PW1. In the above circumstances, this Court is of the view that the prosecution has

miserably failed to prove the common object to attack PW1. It has come out in evidence that when the accused came to the house of PW1, they asked whether PW2 was there. Hence, it is clear that the accused reached the house with common intention of attacking PW2. But on finding that PW2 was not there, appellants 1 and 2 attacked PW1. Further, even if the evidence of PW1, PW3, PW5, PW6 is accepted, there is no evidence to show that the appellants committed house trespass. Hence, the prosecution failed to prove that the appellants have committed house trespass.

11. As per the medical evidence adduced by the prosecution, there were two injuries on the body of PW1. Following are the injuries noted by PW12 doctor:-

1. An incised wound 6 x 4 x 2 cm. On the left side of the scalpula.
2. An incised wound 6 x 4 cm. Bone deep on the left side of the scalp. It is curved in nature.

There is no evidence adduced by the prosecution to prove that the injuries sustained by PW1 are likely to cause death. With regard to that aspect, PW12 doctor was silent regarding the nature of injuries. He

stated that except injury 1 and 2 noted in Ext.P5 certificate, no other injuries were noted by him. Hence, this Court is of the view that the 2nd injury is in grievous in nature and the injury can be caused as alleged. The evidence of PW1, PW3 and PW5 would show that appellants 1 and 2 attacked PW1. In this context, the evidence of PW16 and 17 are also important. According to them, they recovered MO3 and MO3(a) on the basis of the information given by appellants 1 and 2. Hence, this Court is of the view that appellants 1 and 2 are responsible for causing injuries on PW1.

12. On analyzing the entire evidence this Court finds that appellants 1 and 2 are found guilty of the offences punishable under section 324 read with section 34 IPC and they are convicted thereunder. The evidence of PW12 doctor would show that except injury Nos.1 and 2 noted in Ext.P5 wound certificate, no other injuries were noted by the doctor at the time of examination. Hence, the prosecution has not succeeded in proving the offences alleged against appellants 3 to 5 beyond reasonable doubt. Accordingly, they are not found guilty of the offences as alleged by the prosecution. Therefore, the conviction and sentence awarded against the appellants 3 to 5 are set aside and they are acquitted.

13. In the above circumstances, sentence of simple imprisonment for one month each to appellants 1 and 2 and a fine of Rs.15,000/- each under section 324 read with section 34 IPC will meet the ends of justice. Hence, appellants 1 and 2 are sentenced to undergo simple imprisonment for one month and to pay fine of Rs.15,000/- each and in default to undergo simple imprisonment for six months each under section 428 Cr.PC.

The appeal is partly allowed.

K. Thankappan,
Judge.

K. Thankappan,J.

Crl.A. No. 573/2005

Judgment
20-2-2007